IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DUANE PERKINS, et al.,

Plaintiffs,

vs. **Case No. 04-2019-GTV**

RENT-A-CENTER, INC.,

Defendant.

MEMORANDUM AND ORDER

Fifteen Plaintiffs bring this case against Defendant Rent-A-Center, claiming that Defendant discriminated against them because of their race in violation of 42 U.S.C. § 1981, as well as other federal statutes. Plaintiffs are current and/or former employees of Defendant who allege that Defendant engaged in a pattern and practice of racial discrimination in employment practices and policies.

The case is before the court on Defendant's motion to compel arbitration (Doc. 2). Defendant contends that nine Plaintiffs are bound by arbitration agreements covering the claims asserted in this case. For the following reasons, the court grants Defendant's motion in part and denies it in part. Specifically, the court orders that the case is stayed pending arbitration with respect to the claims of Plaintiffs Marvin Askew, Terry Collins, John Ingram, Dave Lewis, Lonnie Lewis, Anthony Bobby Smith, Jerel Welch, and Bene't Williams. The court does not order Plaintiff Adrion Robbins to submit his claims to arbitration at this time.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, "evinces a strong federal policy in favor of arbitration." ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)). If an agreement contains an arbitration clause, "a presumption of arbitrability arises. . . ." Id. (citing AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986)). The presumption may be overcome only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). Where the language is broad, and the agreement contains no express provision excluding an asserted dispute from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ." Id. at 585. However, "[t]he presumption of arbitrability falls away when the dispute . . . is whether the parties have a valid and enforceable arbitration agreement in the first place." Phox v. Atriums Mgmt. Co., 230 F. Supp. 2d 1279, 1281 (D. Kan. 2002) (citations omitted).

Defendant bears the initial burden of establishing that it has a valid arbitration agreement. SmartText Corp. v. Interland, Inc., 296 F. Supp. 2d 1257, 1262-63 (D. Kan. 2003) (citations omitted); Phox, 230 F. Supp. 2d at 1282. Once Defendant has met this burden, Plaintiffs must demonstrate that a genuine issue of fact remains for trial. SmartText Corp., 296 F. Supp. 2d at 1263; Phox, 230 F. Supp. 2d at 1282. "Just as in summary judgment proceedings, a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests. . . ." Tinder v. Pinkerton Sec., 305 F.3d 728, 735 (7th Cir. 2002).

Plaintiffs advance seven reasons why the court should deny Defendant's motion to compel

arbitration. The court will address each argument in turn.

A. Plaintiffs' Awareness of Arbitration Agreements

Plaintiffs first claim that "[s]everal of these nine Plaintiffs had no idea that an arbitration agreement was included in any of the employment documents which they were handed and required to sign by company officials." But Plaintiffs have offered no evidence to support this assertion. While Defendant bears the initial burden of establishing that the arbitration agreement is valid, the burden shifts to Plaintiffs after Defendant has met its initial showing. SmartText Corp., 296 F. Supp. 2d at 1262-63; Phox, 230 F. Supp. 2d at 1282.

Plaintiffs argue that they should be granted time to conduct discovery regarding the manner of presentation and execution of the arbitration agreements. However, this information is readily available to Plaintiffs; they could have each executed an affidavit stating whether they received the arbitration agreements.

The evidence before the court indicates that each Plaintiff signed an agreement entitled "Mutual Agreement to Arbitrate Claims." Each Plaintiff indicated that he understood the terms of the agreement and acknowledged that he was giving up the right to a jury trial and that he had been given the opportunity to discuss the agreement with counsel. Plaintiffs' unsupported assertions are insufficient to overcome this evidence.

B. Illusory Agreements

Plaintiffs next argue that the agreements are illusory because Defendant can change the agreements at any time. However, the documents do not give Defendant the right to unilaterally modify the agreements; they state that they "can only be revoked or modified by a writing signed

by the parties which specifically states an intent to revoke or modify this Agreement."[1] The court is not persuaded by Plaintiffs' argument.

C. Unconscionable Agreements

Plaintiffs also argue generally that the arbitration agreements are unconscionable, citing Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002); and Faber v. Menard, Inc., 267 F. Supp. 2d 961 (N.D. Iowa 2003). They provide no argument on why, specifically, the agreements at issue are unconscionable. The court has reviewed the cases that Plaintiffs cite, and concludes that they are inapposite to the instant case. Moreover, the Supreme Court has expressed its general support for arbitration agreements. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The court declines to hold that the agreements are unconscionable.

D. Lack of Consideration

Plaintiffs also argue that the arbitration agreements fail for lack of consideration. Plaintiffs contend that Defendant's promise to arbitrate certain claims against Plaintiffs is insufficient consideration because the only claims enumerated within the agreement are claims that Plaintiffs possess against Defendant. See Ferguson v. Countrywide Credit Indus., Inc., No. 00-13096AHM(CTX), 2001 WL 867103, at *5 (C.D. Cal. Apr. 23, 2001).

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[1] The court does not have before it the portion of Plaintiff Adrion Robbins's agreement that makes this statement. The court's rulings (here and elsewhere in this opinion) based on terms not included in the one page of Plaintiff Robbins's agreement entered into evidence do not apply to Plaintiff Robbins.

Plaintiffs also note that the agreements of Terry Collins and Jerel Welch are not signed by Defendant, and question whether the signatory for Defendant in any of the agreements had the capacity to sign on behalf of the company.

The court rejects both of Plaintiffs' arguments. First, Defendant has also given up the right to pursue certain claims against Plaintiffs in court. Although claims regarding unfair competition and trade secrets are not covered by the agreement, the court can envision other claims Defendant might bring against Plaintiffs that would be subject to arbitration, e.g., breach of contract. Accordingly, the court determines that the agreements are supported by mutual consideration. See Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 637 (7th Cir. 1999) ("A mutual promise to arbitrate, binding both parties, . . . constitutes sufficient consideration.").

Second, the Federal Arbitration Act does not require arbitration agreements to be signed. See 9 U.S.C. §§ 2, 3; Todd Habermann Constr., Inc. v. Epstein, 70 F. Supp. 2d 1170, 1174 (D. Colo. 1999) (citing Med. Dev. Corp. v. Indus. Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973)). It is immaterial whether a proper representative of Defendant signed the agreements. Again, the court does not find Plaintiffs' arguments persuasive.

E. Limitations on Discovery

Next, Plaintiffs maintain that the court should deny Defendant's motion because the arbitration agreements potentially impose severe limits on discovery. See Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916, 925-26 (M.D. Tenn. 2003); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001); Ferguson, 2001 WL 867103, at *5. Plaintiffs point to the following provisions in support of their position: (1) the

agreements limit fact witness depositions to one per party unless the arbitrator agrees to more; and (2) requests for production are the only paper discovery specifically noted under the agreements, unless the arbitrator agrees to additional paper discovery.

Neither of these restrictions improperly limit discovery. Arbitration discovery provisions are sufficient as long as they "provide[] for more than minimal discovery." Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997); see also Gilmer, 500 U.S. at 31 ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' . . . Indeed, an important counterweight to the reduced discovery . . . is that arbitrators are not bound by the rules of evidence.") (citations omitted).

Moreover, the cases that Plaintiffs cite do not persuade the court that the discovery provisions in this case are unfair. In each of the cases Plaintiffs cite, the court was concerned with apparent bias against additional discovery by the arbitral forum. See, e.g., Walker, 289 F. Supp. 2d at 925-26 (observing that the governing discovery rules permitted additional depositions only in "extraordinary" situations and for good cause); Geiger, 134 F. Supp. 2d at 995-96 (same); Ferguson, 2001 WL 867103, at *5 (noting that the discovery limitations favored the employer). In the instant case, "[a]rbitration will be held under the auspices of either the American Arbitration Association ("AAA"), Judicial Arbitration & Mediation Services/Endispute ("J.A.M.S."), or any other service to which the parties agree." The record is devoid of evidence that these forums are biased against discovery. To the contrary, other courts have noted that the listed forums are liberal in affording additional discovery. See, e.g., Walker, 289 F. Supp. 2d at 925-26; Cole, 105 F.3d

at 1480, 1482. The court determines that the limitations on discovery in the instant arbitration agreements do not justify invalidation of the agreements.

F. High Fees of Arbitration

Plaintiffs also argue that the arbitration agreements potentially impose high fees and costs on them. See, e.g., Walker, 289 F. Supp. 2d at 926-27; Geiger, 134 F. Supp. 2d at 996-97; Ferguson, 2001 WL 867103, at *3-4. The agreements specify that Defendant and Plaintiffs will equally share any filing fees and the cost of the arbitrator's fee, and that each party will bear its own costs and attorney fees. Plaintiffs' argument that these provisions *potentially* could result in high costs for them is unavailing. In Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000), the Supreme Court held that where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing a likelihood of incurring such costs." 531 U.S. at 92. Plaintiffs have presented no evidence indicating that the costs of arbitration are likely to be prohibitively expensive.[2] In the absence of such evidence, the court will not invalidate the arbitration agreement.

G. Incompleteness of Adrion Robbins's Agreement

Finally, Plaintiff Adrion Robbins argues that his purported agreement is unenforceable because the document provided by Defendant is incomplete and consists only of the final page of

[2] Plaintiffs have not argued that the Tenth Circuit's holding in Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999), compels a different result. Nevertheless, the court has fully considered the holding in Shankle, and agrees with Judge Lungstrum's analysis of its impact after Green Tree, as discussed in In re Universal Service Fund Telephone Billing Practices Litigation, 300 F. Supp. 2d 1107, 1127-29 (D. Kan. 2003).

the agreement. Defendant responds that "the evidence is clear that each of the Agreements . . . is a 'form' document that is identical to the others." The court disagrees.

Defendant failed to present evidence from which the court can properly infer that all of the documents are identical. The affidavit of Karen Scranton simply states that Plaintiffs executed arbitration agreements, and that the agreements provide "that claims covered by [the agreements] are subject exclusively to arbitration rather than court litigation. Further, '[t]he claims covered by [the agreements] include, but are not limited to: . . . claims for discrimination (including, but not limited to race . . .).'" Ms. Scranton does not state that all of the documents are identical, state that a particular form was uniformly used in January of 2002, when Plaintiff Robbins signed the document, or otherwise proffer the contents of Plaintiff Robbins's agreement. In the absence of such evidence, the court cannot conclude that Plaintiff Robbins's agreement is enforceable.

Defendant cites Reineke v. Circuit City Stores, Inc., No. 03 C 3146, 2004 WL 442639 (N.D. Ill. Mar. 8, 2004), for the proposition that an arbitration agreement is enforceable, even when the employer loses the original signed agreement. In Reineke, the employer located copies of certain pages of the arbitration agreement, including the signature page. 2004 WL 442639, at *4. Although the employer did not have page two of the agreement, it provided a copy of that page from its form arbitration agreement. Id. The court cannot discern from the Reineke decision whether the employer also authenticated the copy of page two, but to the extent that the employer failed to authenticate the evidence, the court respectfully disagrees with the opinion.

For the above-stated reasons, the court declines to stay Plaintiff Robbins's claims for arbitration. However, Plaintiff Robbins's claims may be subject to arbitration upon further

motion.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendant's motion to compel arbitration (Doc. 2) is granted in part and denied in part. Specifically, the court orders that the case is stayed with respect to the claims of Plaintiffs Marvin Askew, Terry Collins, John Ingram, Dave Lewis, Lonnie Lewis, Anthony Bobby Smith, Jerel Welch, and Bene't Williams. Plaintiff Adrion Robbins need not submit his claims to arbitration at this time.

Copies or notice of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 5th day of May 2004.

/s/ G. T. VanBebber
G. Thomas VanBebber
United States Senior District Judge